Supreme Court, U.S.
FILED
JUL 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2002

In The

Supreme Court of the United States

October Term, 1987

—o—

RIGHT TO LIFE ADVOCATES, INC., ETC. ET AL,

Petitioners,

vs.

AARON WOMEN'S CLINIC,

Respondent.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

—o—

REPLY BRIEF

—o—

Thomas C. Sanders
5874 San Felipe, #1250
Houston, Texas 77057
(713) 781-5932
Co-counsel for Petitioners

Richard W. Schmude
P.O. Box 674
Tomball, Texas 77375
(713) 376-0277
Attorney of Record for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

LIST OF ALL PARTIES

A. *PETITIONERS*:

1. RIGHT TO LIFE ADVOCATES, INC. "d/b/a ABORTION ABUSE ADVICE & INFORMATION SERVICE, ABORTION ABUSE & ADVISORY INFORMATION HOTLINE, and CRISIS PREGNANCY CENTER OF HOUSTON";[1]
2. CRAIG K. ANDERSEN;
3. J. (JIM) BAILEY;
4. LEE P. HELMKE;
5. GARY LOTH;
6. BARBARA A. MARTONE;
7. JOHN A. MARTONE;
8. KATHY MATHEMS;
9. SHEILA MCINTOSH; and
10. JOSEPH J. PESL.

B. *RESPONDENT*:

1. AARON WOMEN'S CLINIC (which is an assumed name of ORIENT SALES CORPORATION, a corporation).

---

1 Petitioner Right To Life Advocates, Inc. is a Texas nonprofit membership corporation without capital stock or stockholders. It is not owned directly or indirectly by any other corporation nor does it own directly or indirectly any other corporation. Hence, it does not have any parent or subsidiary corporation, nor is it affiliated by ownership with any other corporation.

TABLE OF CONTENTS

Page

LIST OF ALL PARTIES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REPLY ARGUMENT 1

I. THE PETITION IS SOUND JURISDICTIONALLY 1

II. THE CHALLENGES TO *ROE V. WADE* ARE BEFORE THIS COURT PROPERLY 2

III. THE TEXAS COURTS VIOLATED DUE PROCESS WHEN THEY DENIED PETITIONERS' DEFENSES OF UNCLEAN HANDS AS POSTURED UNDER EXISTING TEXAS LAW 6

IV. *ROE V. WADE* SHOULD BE OVERRULED 9

TABLE OF AUTHORITIES

Page

I. CASES:

City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) 10

City of Wink v. Griffith Amusement Co., 100 S.W. 2d 695 (S.C. Tex., 1936) 7

Humphreys-Mexia Co. v. Arseneaux, 297 S.W. 225 (S.C. Tex., 1927) 7

Riley v. Davidson, 196 S.W. 2d 557 (Tex. Civ. App.—Galveston, 1946), writ. ref. n.r.e. 7

Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*

Shelly v. Kraemer, 334 U.S. 1 (1948) 1-2

II. U.S. CONSTITUTION AND ANNEXATION ACCORD:

U.S. Constitution:

Article VI (Supremacy Clause) 8

14th Amendment (Due Process Clause) 1, 7

14th Amendment (Equal Protection Clause) 2

Annexation Accord (1845) 8

III. TEXAS CONSTITUTION AND STATUTORY PROVISIONS:

Texas Constitution:

Article I, Sec. 8 ..... 7-8, 8

Texas Family Code:

§ 35.01 8

§ 35.03(a)(4) 8

IV. MISCELLANEOUS:

Brief for the United States as Amicus Curiae in Support of Appellants in Nos. 84-495 and 84-1379, *Thornburgh v. American College of Obstetricians and Gynecologists* and *Diamond v. Charles*, pp. 20-24 10

REPLY ARGUMENT

I.

THE PETITION IS SOUND JURISDICTIONALLY

Respondent claims (Response, pp. 1-2) that the Petition should be denied because of a jurisdictional defect, namely, that it does not present the required state action for 14th Amendment (Due Process Clause) purposes. The constitutional and jurisdictional challenges to *Roe v. Wade,* 410 U.S. 113 (1973), however, do not require "state action." They involve a decision of this Court and are before the Court properly. As shown on pp. 2-5, below, *Roe* was challenged collaterally in the Trial Court, and, while most of the arguments on pp. 11-19 of the Petition were not made there they were advanced before the Court of Appeals and Supreme Court of Texas.

While state action is important to Petitioners' challenge to appellate rulings under the Due Process Clause of the 14th Amendment to the U.S. Constitution, the Petition shows clearly that such state action was present (Petition, pp. 7-11). The initial decision of the Court of Appeals operated to deprive Appellants of their rights to defend themselves under the defense of unclean hands under Texas law; the deprivation was compounded when, on rehearing, Justice Bill Cannon withdrew his approval of the "majority opinion" and concurred in result only, thereby depriving Petitioners' of such rights when a majority of the panel did not so rule; and the Supreme Court of Texas abused its discretion manifestly with its denial of Petitioners' application for a Writ of Error. There should be no question but that the complained of actions of such courts constitute "state action" under the Due Process Clause of said 14th Amendment. See *Shelly v. Kraemer,*

334 U.S. 1, 14-18 (1948) (ruling by a state court as state action under the Equal Protection Clause of said 14th Amendment).

II.

THE CHALLENGES TO ROE V. WADE ARE BEFORE THIS COURT PROPERLY

1. Among other defenses, all Petitioners pleaded or adopted the following before the Trial Court (Tr. 43-44; see Tr. 55):

IX.

EQUITABLE DEFENSE—UNCLEAN HANDS DUE TO THE VIOLATION OF CERTAIN TEXAS CRIMINAL LAW

Plaintiff is not entitled to injunctive or other relief because Plaintiff has entered this Court, seeking equitable and other relief, with unclean hands. Plaintiff is engaged in the wholesale killing of Unborn Children in violation of the Texas anti-abortion law revived as a legal effect of *Roe v. Wade*, 410 U.S. 113 (1973), such law being the English statutory and/or common law adopted as law in the Republic of Texas and carried forward into Texas law by the 1845 Annexation Accord between the United States and the Republic of Texas. Such law was in place in Texas in 1854 at the time Texas enacted the anti-abortion laws which the Supreme Court declared to be unconstitutional in *Roe*. Such law is of supremacy clause stature under Article VI of the U.S. Constitution because it was carried forward into Texas law by said 1845 Accord which, in turn, is of treaty status under said Article VI. Such law was revived, under the doctrine of revival, as a legal effect of *Roe*.

X.

EQUITABLE DEFENSE—UNCLEAN HANDS DUE TO THE VIOLATION OF CERTAIN TEXAS ANTI-ABORTION LAW

Plaintiff is not entitled to injunctive or other relief because it has unclean hands because it has car-

ried on and continues to carry on abortion activities in violation of the Texas anti-abortion laws which the U.S. Supreme Court purported to hold unconstitutional in *Roe v. Wade,* above. *Roe,* however, is void as violative of the due process clause of the Fifth Amendment to the U.S. Constitution, the Ninth Amendment to the U.S. Constitution, the division of powers concept as guaranteed by the Tenth Amendment to the U.S. Constitution and certain federal statutory law and Article VI (supremacy clause) of the U.S. Constitution. Further, *Roe* is void as violative of fundamental principles of personal jurisdiction since neither Abortion "Survivors" who die because of abortion nor Unborn Children affected by abortion were before or represented before the 3-Judge District Court or the U.S. Supreme Court in *Roe* by guardian or next friend, or by counsel for such guardian or next friend.

At the hearing on temporary injunction, Counsel for five Petitioners (Right to Life Advocates, Inc., Helmke, Loth, McIntosh and Pesl) argued the unclean hands defense under Section IX, above (S.F. 482-485); and, in relation to the unclean hands defense in Section X, above, said, in part, that *Roe* was "void for a number of reasons, and I'm going to mention just the chief reasons" (S.F. 485). While the Trial Court was not receptive (S.F. 485-488), Counsel argued that the "children were not represented"; that "[b]abies born alive after abortion die because of abortion" and "[t]hey are United States citizens" and "were not represented"; that there was "no personal jurisdiction over them or the unborn"; and that "[t]he Court manufactured the right to kill by abortion" (S.F. 488). The Trial Court said, "I may agree with everything you say, but there is absolutely no way I could set aside Roe v. Wade" (S.F. 488). Counsel replied (S.F. 488-489):

> One thing, Judge: On the face of the—on the face of the decision, on the face of the judgment, there is no representation and no personal jurisdiction, and just following Supreme Court precedent, the thing is void, so we want to preserve that argument, and, if this case does go up, this will be urged all the way up.

The Trial Court ruled against the defense of unclean hands in its Memorandum of Opinion but, in so doing, did not address the unclean hands defense in Section IX, above, i.e., violation of revived Texas anti-abortion law of U.S. Constitutional stature ("revival contention") (Pet. App. 36-39).

2. At the trial on the permanent injunction, the Trial Court said, in part, that it had ruled by written memorandum, and that it was "not prepared at this time to change its opinion of the case" (S.F. 517). Thereafter, Counsel for such five Petitioners made various arguments, including the revival contention (S.F. 522-525).

After such argument, the Court said, in part (S.F. 526):

> There were several arguments that were made that were dealt with in an umbrella fashion. Some were not stated and overruled specifically, but obviously implicit in all the arguments, much like this last argument, is that *Roe v. Wade* effectively forecloses your argument that abortion is murder within the first trimester * * *.

The Court said that it had rendered its opinion, and that it was going "to leave it in the hands of those in the Appellate Courts * * *" (S.F. 541).

3. Respondent claims that "Petitioners' arguments made under the Fourteenth Amendment to the Texas Constitution (sic) and the numerous challenges to *Roe v. Wade*

were not preserved in the Trial Court. (Tr. 27, 41)" (Response, p. 2).[2] While it is true that most of such grounds were not advanced in the Trial Court, this does not mean that Petitioners are precluded from advancing the same before this Court since the revival contention and the claim that *Roe* was void as violative of the U.S. Constitution and fundamental principles of personal jurisdiction were raised in the Trial Court. It was not essential that all constitutional and jurisdictional *arguments* against *Roe* be asserted in the Trial Court where, as here, the constitutional and jurisdictional positions against Roe, through an application of the unclean hands defense, was taken and preserved there. On appeal, Petitioners advanced—without objection or complaint by Respondent—the various challenges (originating in an application of the defense of unclean hands) on pp. 11-19 of the Petition. Such challenges were unsuccessful before the Court of Appeals and the Supreme Court of Texas and are before this Court properly.

Except for the revival contention (Petition, pp. 21-23), the additional reasons Petitioners advanced for overruling *Roe,* as set forth on pp. 19-29 of the Petition, were not raised in the Texas Courts. That does not, however, fore-

---

2 The record references cited do not support the contention. While the original answer of five Petitioners (Andersen, Bailey, Mathems and the two Martones) was a general denial (Tr. 27), their first amended original answer incorporated by reference all defenses filed in the original answer of the five remaining Petitioners (Tr. 55; see Tr. 41-45). There were two defense attorneys, each representing five different defendants.

close this Court from considering them because the Texas Courts were hardly proper fora for their consideration and resolution. *Roe* is of this Court's making. Since the Texas Courts were powerless to overrule *Roe,* the policy, social and other considerations set forth therein for such overrule were plainly for this Court. They are ancillary to the revival contention and the constitutional and jurisdictional challenges and are before this Court properly.

In any event, this Court's responsibility as final arbiter of the Constitution hardly can be circumscribed by the arguments or failures at argument by private litigants before it. Suffice it to say, the *issue* of the constitutionality and lawfulness of *Roe* is before the Court properly; and the Court has the constitutional authority to address the merits of that issue fully. See footnote 3, *infra,* where the United States, in an *amicus curiae* brief, requested the Court to reconsider and overrule *Roe* in a context where, unlike the instant case, the question of overrule was not presented apparently in the lower courts.

III.

THE TEXAS COURTS VIOLATED DUE PROCESS WHEN THEY DENIED PETITIONERS' DEFENSES OF UNCLEAN HANDS AS POSTURED UNDER EXISTING TEXAS LAW

Next, Respondent contends that Petitioners' (due process) argument must fail because (1) Respondent is not guilty of unclean hands since "[o]perating a legal business in a lawful manner cannot constitute unclean hands as a matter of law" (Response, p. 3), and (2) Petitioners lacked standing to sustain the defense of unclean hands since, under Texas law, they were not injured by Respondent's activities (Response, p. 4). The contention is without merit.

1. As for standing, it is clear—under Texas law—that one who is engaged in unlawful conduct or business is not entitled to equitable relief in order to preserve or aid the same. *City of Wink v. Griffith Amusement Co.*, 100 S.W. 2d 695, 702 (S.C. Tex., 1936); *Humphreys-Mexia Co. v. Arseneaux*, 297 S.W. 225, 229-230 (S.C. Tex., 1927); *Riley v. Davidson*, 196 S.W. 2d 557, 559, 560 (Tex. Civ. App.—Galveston, 1946), writ ref. n.r.e. In addition, there is no requirement that the one who raises the defense of unclean hands in such a context be injured by such conduct or business *Ibid.* Yet noninjury was the reason put forth by the Trial Court and the initial decision of the Court of Appeals to deny Petitioners' rights under such defense.

Petitioners' rights in such regard were clear and the Court of Appeals deprived them of liberty and property without due process of law, in violation of the 14th Amendment to the U.S. Constitution, when it denied the defense to them. While the Court's ruling in that regard was contained in its initial decision (2:1), it lacked majority approval after rehearing—when Mr. Justice Cannon withdrew his approval of the "majority opinion" and concurred in the result only (Pet. App., 23-24).

Respondent argues (Response, p. 4) that the parties in the above cases "had real interests in the controversy and were acting to protect their rights" whereas the Petitioners "are not suffering the harm, if any, by pregnancy terminations." Nonsufferance of abortion harm, however, is *not* the test of interest in *this* controversy. Petitioners have substantial interests in the premises: They are entitled (1) to exercise, peacefully and reasonably, their liberties of speech and press under Article I, Section

8, of the Texas Constitution in the context of this lawsuit; (2) to offer literature, counsel and assistance to women about to enter the building in question so that such women might exercise *their* speech and press rights under Article I, Section 8, of the Texas Constitution, by receiving/exchanging information, etc. with Petitioners; and (3) to defend their liberties and their properties under applicable law against Respondent's lawsuit concerning injunctive relief.

2. On the merits, Respondent is guilty of unclean hands under Texas law because its abortion business is unlawful. First, such business violates the Texas anti-abortion law which this Court purported to hold unconstitutional in 1973 in *Roe v. Wade.* Such law is still in effect because Roe is void as violative of the U.S. Constitution and of fundamental principles of personal jurisdiction (Petition, pp. 11-19).

Second, if it is assumed that *Roe* is a lawful and constitutional decision, such business would violate Texas anti-abortion law which was revived as law in Texas as a legal consequence of *Roe,* and such law is of supremacy status under Article VI of the U.S. Constitution as between the United States and Texas because it was carried forward from the laws of the Republic of Texas into the laws of the State of Texas by the 1845 Annexation Accord between the United States and the Republic of Texas (Petition, pp. 21-23).

Finally, and apart from the above, that aspect of Respondent's business involving the aborting of unmarried minors without lawful parental or other consent violates the consent provisions of the *Texas Family Code,* §§ 35.01 and 35.03(a)(4).

IV.

ROE V. WADE SHOULD BE OVERRULED

Finally, in shotgun fashion, Respondent contends (Response, p. 5) that *Roe v. Wade* should not be overruled because (1) the Petitioners have not presented a valid or procedural challenge thereto due to their lack of standing, (2) the reasons which caused the Court to decide *Roe* stand as arguments against its overrule, (3) *Roe* has withstood "numerous constitutional challenges", Petitioners' arguments re-present primarily many of these arguments and the Petition "presents no new constitutional arguments that should be reviewed", and (4) the additional reasons referenced in the Petition for overruling *Roe,* i.e., unintended consequences (including revival contentions) and factual or other errors (Petition, pp. 19-29), were not supported by the evidence in the record, were not raised in the Trial Court and, when considered and reviewed, do not provide sufficient grounds for overruling *Roe.*

Reasons "(1)" and "(4)", above, were addressed on pp. 5-6, 6-9 of this Reply Brief and need not be repeated here. Suffice it to say they are wholly without merit since the Court does have jurisdiction to entertain an overruling of *Roe* and, in so doing, may give due consideration to the additional reasons advanced on pp. 19-29 of the Petition. Such reasons are addressable properly by this Court which, of course, is the only tribunal in the United States with authority to overrule *Roe.*

As for reasons "(2)" and "(3)", above, the short answer is that, to Petitioners' knowledge, the Court has not entertained and resolved constitutional or jurisdictional challenges to *Roe* brought by parties in cases where

review was granted or otherwise taken by the Court.[3] Accordingly, the constitutional and jurisdictional challenges to *Roe* presented by the Petitioners, which have *not* been disposed of *on the merits* previously by the Court, are appropriate and ripe for consideration.

To be sure, the Court, in 1983, reaffirmed *Roe* on grounds of *stare decisis*. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419-420 (1983). But *stare decisis* is a weak basis for the upholding of a decision which purports to interpret the U.S. Constitution. That document, of course, constitutes supreme law in this Nation, and the Court should be receptive to re-examination of its interpretive work in light of claimed error or other appropriate reason. Vested Error has *no place* in the constitutional life of this Nation or the Rule of Law.

The Petition sets forth numerous bases for the overruling of *Roe* which need not be repeated here. Suffice it to say, they are substantial and are before the Court properly.

Respectfully submitted,

RICHARD W. SCHMUDE
P.O. Box 674
Tomball, Texas 77375
(713) 376-0277

Attorney of Record for Petitioners

THOMAS C. SANDERS
5874 San Felipe, # 1250
Houston, Texas 77057
(713) 781-5932

Co-counsel for Petitioners

---

3 In 1985, the United States, in an *amicus curiae* brief, urged the Court to reconsider and overrule *Roe*. See Brief for the United States as Amicus Curiae in Support of Appellants in Nos. 84-495 and 84-1379, *Thornburgh v. American College of Obstetricians and Gynecologists* and *Diamond v. Charles*, pp. 20-24.